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IN THE

Supreme Court of the United States

October Term, 1962.

No. 113.

CHARLES CHRISTOPHER CAMPBELL, CHARLES WILLIAM LANG and THELMA ADELE ENSOR,
Petitioners,

v.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

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PETITION FOR REHEARING OF ORDER ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Supreme Court of the United States:

Your petitioners hereby petition this Honorable Supreme Court for a rehearing of their Petition for a Writ of Certiorari. The present petition is filed under the provisions of Rule 58(2) of the Revised Rules of the Supreme Court of the United States.

On November 13, 1962, this Court denied petitioners' Petition for Writ of Certiorari to the Supreme Court of Pennsylvania.

They now petition the Court to rehear their original petition and to reconsider the order of denial of this case for substantial reasons not previously presented, and not in the record of this case nor available to the petitioners until the filing of the Brief for the Commonwealth of Pennsylvania on or about October 30, 1962.

ADDITIONAL QUESTION TO BE DECIDED.

Where the record on appeal shows that a search warrant was invalid on its face, but where the case was tried prior to this Court's decision in *Mapp v. Ohio*, and the State Appellate Courts refused to review the validity of the search warrant, were petitioners deprived of due process of law guaranteed by the Fourteenth Amendment?

ADDITIONAL REASONS RELIED UPON FOR THE GRANTING OF THE WRIT.

At the time the Petition for Writ of Certiorari was filed in this case, it was specifically noted that "the warrant does not appear in the record, and it is not shown whether the warrant authorized a search in the nighttime or was restricted to the daytime, nor is the scope of the warrant disclosed." Petition for Writ of Certiorari, page 4.

In the Commonwealth's Brief, filed in opposition to the petition, the complaint and search warrant were for the first time put in the record of this case. Brief for Commonwealth of Pennsylvania, pp. 9 to 11. This Court's decision denying certiorari was rendered before petitioners had an opportunity to file a reply brief. However, it appears from the face of the complaint and warrant, thus put into the record by the Commonwealth, that the complaint and warrant are defective for the following reasons:

1. The Complaint Does Not State That There Was Reason to Believe the Articles Would Be Used Illegally.

Pennsylvania law does not prohibit the possession of instruments which could be used for the purposes of performing abortions. In fact, a law prohibiting such possession would undoubtedly be unconstitutional, since there are many drugs, substances or instruments which could be used for abortion purposes, which are also normally used for many proper legal purposes. Under such a law, every doctor, druggist and even housewives could be considered possessors of illicit instruments. Likewise, not all abortions are unlawful; clearly, abortions induced for medical reasons may be completely lawful.

The complaint for the search warrant, set out by the Commonwealth, states only "that there is just cause to suspect that articles and instruments to procure abortions are possessed . . ." This does not charge that there is any probable cause to suspect that the articles and instruments are intended to be used unlawfully or to commit unlawful abortions. The warrant itself follows this language, and thus does not correct any defect. Such a warrant could be thus utilized for the search of any drugstore, doctor's office or even any kitchen, bathroom or room containing a medicine cabinet.

In this Court's decision in *Mapp v. Ohio,* 367 U. S. 643 (1961), this Court concluded that the exclusionary rule enunciated in the Fourth Amendment is applicable under

the Fourteenth Amendment to protect citizens from invasions by State officials. It has long been held in the Federal Courts, and specifically recognized in the Federal Rules of Criminal Procedure, that search warrants cannot be used for general exploratory searches, nor for the disclosure of merely evidence, but may be issued only to search for and seize property (1) stolen or embezzled in violation of the law (fruits of a crime), (2) designed or intended for use or which is or has been used as the means of committing a criminal offense (instrumentalities of a crime), (3) contraband, or (4) weapons. See, *e.g., United States v. Lefkowitz,* 285 U. S. 452 (1922); *Gouled v. United States,* 255 U. S. 298 (1921); Federal Rules of Criminal Procedure, Rule 41. Here, the complaint and warrant set forth in this record are not directed towards the search for and seizure of fruits of a crime, instrumentalities, contraband or weapons; they are directed at objects which could be innocent and lawfully used, since there is no allegation to the contrary.

Accordingly, the complaint and warrant are defective on their face, as appears from the record presently before this Court. There was no way for petitioners to develop this at any prior stage of the proceedings.

2. The Complaint and Warrant Did Not Justify Nor Authorize a Nighttime Search.

The affiant swore in the complaint for search warrant, appearing on p. 9 of the Commonwealth's Brief in opposition, that "from information received which he believes, at the Township of Heidelberg, in the County, aforesaid, that there is just cause to suspect that articles and instruments to procure abortions are possessed, and he has just cause and probable cause to believe and does believe, in a one story concrete block, ranch type building . . . ." It is thus apparent from the face of this complaint that the affiant had no personal knowledge of the facts set forth therein, and he was not positive that the items were located at the place designated.

The search warrant, appearing on pp. 10-11 of the Commonwealth's Brief, states ". . . There is just cause to suspect that articles and instruments to procure abortions are possessed in a place described as a one story concrete block, ranch type building. . . . These are therefore to command you to make diligent search in the building heretofore described, any parcel thereto, outbuildings and conveyances for the articles, devices or instruments to procure abortions. . . ." Thus, the search warrant itself is issued without any showing that the information is positive, and it does not restrict the search to the daytime. As a matter of fact, as appears from the record of this trial, the warrant was served in the nighttime (70a).

The Federal Courts have long recognized that nighttime intrusions into the privacy of citizens are to be condemned. In order to implement this condemnation, the Federal Rules of Criminal Procedure specifically require for the issuance of a nighttime warrant that the affidavits be positive that the property is on the person or in the place to be searched. Federal Rules of Criminal Procedure, Rule 41(c); see *Jones v. United States*, 357 U. S. 493 (1958).

Thus, the Fourth Amendment to the Constitution, as implemented by the Federal Rules, declares that any search in the nighttime is unreasonable unless there is a search warrant based on an affidavit that illicit property is positively located upon the premises to be searched. Although there were not, at the time of this trial, any Rules of Procedure in Pennsylvania specifically setting forth the procedures to be followed in the issuance or execution of search warrants, since this Court's decision in *Mapp v. Ohio* such evidence should not be admitted in the Pennsylvania courts.

In the case at bar, it did not appear of record until the Commonwealth filed its Brief that the affidavit was not positive and that the search warrant did not specifically authorize a nighttime search. Therefore, on the affidavit and warrant appearing in this record, only a search in the

daytime could be sustained. Accordingly, petitioners were deprived of due process by the admission into evidence against them of property seized under this warrant.

CONCLUSION.

In the case *sub judice*, the Superior Court of Pennsylvania refused to apply this Court's decision in *Mapp v. Ohio*, since the petitioners had not shown at their trial conducted prior to *Mapp* any illegality in obtaining the search warrant. It is respectfully submitted that the complaint and search warrant put into the record by the Commonwealth in its Brief in opposition to the petition filed in this Court for writ of certiorari clearly demonstrate the illegality in the issuance and execution of the search warrant. This, it is respectfully submitted, is a substantial ground for this Court to review the convictions below, not previously presented in this Court for the reasons set out herein.

Respectfully submitted,

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I hereby certify that this Petition for Rehearing is presented in good faith and not for purposes of delay, and that the petition is restricted to the argument of substantial grounds not previously presented.

STANFORD SHMUKLER.